UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

COMMUNITY RENEWAL TEAM, INC.

and **Case No. 34-CA-10991**

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 376, AFL-CIO

***Thomas Quigley, Esq.,* for the General Counsel.**
***Kenneth R. Plumb, Esq.,* (Berchem, Moses & Devlin, P.C.) Milford, CT for the Respondent.**
***Michael Langston, Business Agent,* Newington, CT, for the Charging Party.**

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376, AFL-CIO, herein called the Union or the Charging Party, the Director for Region 34 issued a complaint and Notice of Hearing on December 29, 2004,[1] alleging that Community Renewal Team, Inc., herein called the Respondent or CRT, violated Sections 8(a)(1) and (5) of the Act, by failing and refusing to supply information requested by the Union on October 18.

The trial with respect to the allegations set forth in the complaint, was held before me in Hartford, Connecticut on February 24, 2005. Briefs have been filed by the General Counsel and the Respondent and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I issue the following

[1] All dates herein after are in 2004 unless otherwise stated.

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a non-profit Connecticut corporation, located in Hartford, Connecticut where it is engaged in providing various educational and social services to low income individuals and families at various sites throughout Connecticut, herein called its Connecticut facilities. During the 12 month period ending November 30, 2004, Respondent derived gross revenues in excess of $250,000 and purchased and received at its Connecticut facilities, goods valued in excess of $5,000 directly from points located outside the state of Connecticut.

Respondent admits, and I so find, that Respondent is and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section of 2(5) of the Act.

II. Facts

Respondent operates numerous federal and state funded programs, including “Meals on Wheels”, housing programs and educational programs. It has over 140 specific funding sources for its various programs, primarily from the federal government through the Department of Health and Human Services (HHS), and from the state of Connecticut, generally through Connecticut Department of Social Services. (CDSS) The contracts with HHS and CDSS usually require Respondent to spend the money on the specific programs referenced in the contract. If Respondent were to use funds restricted for use by specific programs it would be subject to both having the fund recouped by the agency which provided the funds and / or having the particular program cancelled.

Respondent also receives some funds from other sources, such as public foundation donations, agency fundraising, plus certain grants which are allocated to Respondent, all of which are unrestricted, and can be used by Respondent for any purpose or for any program.

Respondent employs approximately 1030 employees in its programs, including approximately 230 employed in Respondent’s Early Child Care Education Program, (ECE). The ECE program provides education and care to children from low income and disadvantaged families, and received its funding from the federal government through the Head Start Program, and from the State of Connecticut through several sources including the CDSS, School Readiness Program and Care for Kids Program. Additional funding comes from fees paid by parents whose children participate in these programs. Respondent’s ECE division is divided into two sections. Sixty (60%) percent of the 230 employees in the division is comprised of Head Start employees, also called “39 week employees.” The remaining forty (40%) percent of Respondent’s ECE employees, called “52 week employees”, are employed in the “School Readiness Program”, which consist of the various State funded programs. The Head Start Program, is funded by the Federal government, and monies provided for that program cannot be utilized to fund the School Readiness services.

The Union was certified on August 24, 1999 to represent Respondent’s employees in a unit of ECE employees. The unit covers number of classifications such as teachers, family service workers, kitchen aides, drivers, and numerous others. The parties subsequently entered into a collective bargaining agreement, which by its terms, was effective from January 1, 2001 through December 31, 2003. The agreement provided for annual increases for all unit

employees each year of the contract, ranging from 2% to 3.5%, plus an annual COLA. The COLA amount is not specified in the contract, but it provides that all unit employees would receive the COLA determined by HHS for Head Start employees.[2] The COLA is generally announced by HHS in late spring or early summer of each year, and is then instituted retroactively to January of that year.

The parties commenced negotiations for a successor collective bargaining agreement in November of 2003. At the outset of negotiations, the Union submitted an extensive request for information, which was provided by Respondent. The parties have met approximately 20 times, as of the date of the trial, and have been unable to reach agreement.

Respondent's primary negotiator and chief spokesperson was Joyce Smith, its Director of Human Resources. Respondent's General Counsel, Anthony Palermino, attended about half of the bargaining sessions. Joe Calvo, International Representative for the UAW, and Mike Langston, the Union's Business Agent were the chief spokesmen for the Union. Russ See the President of the Union was also present at some bargaining meetings.

At one of the earlier bargaining sessions, the Union presented its proposals. Included therein is a proposal for a "substantial wage increase", plus additional wages based on education for all classifications. The Union has not to date, made any more specific proposals concerning wages.

Prior to the bargaining session on March 5, 2004, Respondent had instituted an increase in the amount of money paid by unit employees for health coverage by raising deductibles paid by employees, due to increases imposed upon Respondent by the carrier. Additionally, the Union had made a proposal that Respondent increase the amount paid for health coverage from 75% to 85% of the premium's charged by the carrier. The Union's representatives complained at the March 5, meeting that Respondent had acted unilaterally, and had not notified the Union of its intention to raise premiums and deductibles paid by employees. Smith responded that she had notified the Union back in December of 2003, that premiums were being raised by 30%, and that it needed to institute the increases to make up for this rise in the premiums. The Union disputed the fact that it had been notified previously, but concluded that Respondent had valid reasons for instituting the increases. Thus the Union did not pursue the matter further, and did not file charges concerning Respondent's action. [3]

After the discussion concerning the premium increases were concluded, Russ See asked if Respondent was claiming poverty or inability to pay. At that point, Palermino asked for a caucus. He explained to his team the significance of the Union's request and the reasons for Respondent's position. After the caucus, Palermino responded to See's request that CRT was not claiming "inability to pay," but CRT is not willing to use other monies to pay for ECE's programs.

The parties met once again on April 8. At this meeting Respondent presented its wage offer, as part of its economic package. It provided for the payment of the Head Start COLA[4] for all ECE employees for the first year of the contract, and with wage re-openers for each of the

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[2] I note that although the COLA is authorized by HHS only for Head Start employees, Respondent agreed to give the same COLA to non Head Start employees, i.e., School Readiness employees as well.

[3] The increases were made effective on February 1, 2004.

[4] The amount of the COLA had not as yet been determined by HHS.

future years. The parties talked about the amount expected to be authorized for the COLA. Both parties believed it would be from 2.5 to 2.6%. The Union representatives asked if CRT had the ability to pay above the COLA money, and could CRT pay wages from other programs.

Respondent replied that CRT had done so in the past but it is not going to do so. Smith stated that Respondent intended to fund the increases for ECE from ECE funds, (plus the COLA from HHS), and that Respondent wanted ECE to be able to run on its own budget. Smith added that ECE could not support any increases apart from the COLA.

The Union Representatives asked about other program money that CRT receives. They talked about money from the State, (which funds the school readiness portion of the unit,) and Respondent explained that the State funding is flat, and in fact Respondent is losing money on that money. Further, Smith explained that Respondent is in fact cutting back on some programs because of reduced funding. The Union asked about "quality money," and whether this money can be used for wages. Smith replied that she was not sure if such money can be used for wages, but she would check to see if any such monies existed.

The parties also discussed at this meeting, as well as at other meetings, Respondent's decision to layoff some employees from the school readiness program, due to lack of funding, and revisions in eligibility requirements for certain programs. The Union requested that Respondent supply the Union information with respect to these funding issues. Respondent supplied the requested information on or about 5/11/04.

At either this meeting or another bargaining session, Smith again mentioned the deficits in funding, and stated that "ECE doesn't have any money." Smith offered to open up the books of ECE to the Union. The Union made no response to this offer at that time. Some employees were in fact laid off, as a result of these funding problems, but many of them were offered and accepted positions with Respondent in other programs.

Additionally at several meetings with the Union, Smith informed the Union that due to restrictions in many of the grants, that Respondent was prohibited from taking money from one funding source and to use these funds to pay for increases in ECE programs. Smith stated that Respondent cannot "rob Peter to pay Paul." Smith also told the Union that there were some non ECE funds that were unrestricted and could be used fund increases, but Respondent chose not to use them for ECE programs.

My findings with respect to the events described above at the various negotiation sessions, is based on a compilation of the credible portions of the testimony of Smith, Palermino, Langston and Calvo, as well as bargaining notes taken by these individuals. Most of the findings described above are not in essential dispute. However, General Counsel argues that the testimony of Smith and Palermino, that Palermino said to the Union on March 5, after telling the Union that Respondent was not claiming an inability to pay, but was not willing to use monies from other than ECE sources to fund ECE programs, should not be credited. General Counsel points out in this regard that the latter comments are not included in the bargaining notes of either Smith or Palermino. However, I note that this comment by Palermino on March 5, is similar to the statement made by Smith at the April 8 meeting, that CRT had the ability to pay for raises above the COLA from other programs, "but we are not going to." This comment comes directly from the bargaining notes of Langston. I also note that neither Langston nor Calvo furnished rebuttal testimony, or made specific denials that Palermino stated on March 5, that CRT was not willing to use monies other than from ECE sources to fund ECE programs. I therefore credit Smith and Palermino that Palermino did make that statement to the Union.

On September 9, the Union requested that Respondent submit a "final offer", since the Union had a membership meeting that evening, to discuss a possible strike vote. Smith outlined the terms including a 1.6% COLA increase for all unit employees (both Head Start and School Readiness employees), to be reflected in the salary scale and payable on September 17 retroactive to January 1, no wage increase, the removal of maximum accrual for sick leave, increase in personal days for 39 week employees, and language regarding the use of substitutes. Respondent also proposed a one year contract, Smith explained that Respondent was hopeful that the Connecticut Legislature would provide more funds, so that more money would be available for increases in subsequent years. The Union asked Smith to provide a copy of its offer in writing, and Smith complied with this request.

Calvo requested that Respondent provide a "kicker", in the form of a signing bonus or another form of lump sum payment, in order to sell this package to the membership. Smith responded that the Agency is in deficit, and it doesn't have any money to pay beyond the COLA. Smith added that "you can't get blood from a stone." Smith also repeated during this meeting, what she had stated at prior meetings. That is, that Respondent (CRT) had decided that each agency program, such as ECE needs to be able to run on whatever their budget is, and that due to funding problems from the State, ECE is and has been running a deficit. Indeed, as noted Smith suggested a one year contract, in the hope of increases in funding from the Connecticut legislature sometime in 2005.[5]

The Union conducted its membership meeting that evening. The final offer of Respondent was presented to the membership, with a recommendation to reject. The membership rejected the offer, but declined to authorize a strike. The Union officials informed the members that the Agency had claimed that it had a deficit of $700,000, and therefore it had no money for raises. The members were also informed that Respondent had already provided documentation supporting the existence of a deficit. The documentation referred to was the information concerning reductions of funding in the School Readiness Program, which had been provided by Responded in connection with the prior layoffs.

The membership, pursuant to the Union's request, urged the Union to go back to the bargaining table and seek to obtain a better offer. It was decided to notify parents of clients of the dispute to enlist their support and notify the parents that if there was an eventual strike, they would not be surprised. The letter sent to parents reads as follows:

IMPORTANT INFORMATION
FOR OUR PARENTS

Dear Parents:

> Since we, the staff at your child's classroom, respect you and your child's education, we have developed this flyer to inform you about certain events that have occurred, and some that may

[5] The above findings concerning the September 9 meeting is based on a compilation of the credited portions of the testimony of Smith, Langston and Calvo, as well as bargaining notes of Langston. While I find the comments made by Smith that "you can't get blood from a stone", was made after a statement about the Agency being in deficit and that it did not have money to pay beyond the COLA, I conclude from other portions of the meeting as well as prior meetings, Smith was referring to deficits of ECE and ECE's problems with paying more than the COLA, and that the Union so understood.

yet occur. We do this because we value both your understanding and your support.

In December 2003, our three year labor agreement expired. Although we have been in negotiations since late 2003, CRT has failed to offer us a fair contract. Instead CRT has increased our share of our medical coverage and has replaced our medical plan with one that has higher co-pays and higher deductibles!!

CRT has also refused to change from its initial offer regarding wages. They are offering us a 1.6.% increase in the first year, with no offers of wages in either the second or third year. We find that to be extremely unfair and unreasonable, yet they continue to refuse to change their position.

CRT has also failed to agree on a reasonable solution to the "substitute teacher" problem. You see, under the contract, substitutes are not entitled to benefits such as medical insurance, paid sick days, holidays and many other benefits. The contract allows CRT to use substitutes under a limited basis, such as when someone is out sick, or someone is out on disability, but CRT has abused this! Many substitutes are covering for vacant positions for many, many months when they should instead be hired as regular employees. There are other issues that remain open at the bargaining table, yet CRT continues to refuse to settle on a fair contract.

On August 25, 2004, the membership held a vote and rejected the company's offer, but we also voted not to strike at this point in time. This was done to allow us to have the opportunity to inform you, the parents, about what is going on and to give you advance notice that we will again be voting in late September or early October. At that time, unless a fair contract is negotiated, we may vote to go our on strike. We do not want to do this, but we are limited in our choices.

We are asking for your help to avoid having a strike at CRT, and to avoid an interruption in your child's education. You can help by contacting CRT management and urging them to settle on a new contract. You should contact either Joyce Smith at 560-5663 or Paul Copes at 560-5617. Let them know that you do not want a strike and that CRT must make a fair offer and settle the contract.

Thank you for your cooperation and understanding in this matter. With your help, we hope we can sign our contract and continue to provide an uninterrupted quality education for your child.

Please contact either Joe Calvo at (860) 674-0143 or Michael Langston at (860) 953-1346 if you have any questions or

concerns. Once again, thank you.

The staff at CRT

On September 30, Smith telephoned Langston. Smith initially complained about her phone number being on the letter, and then the discussion turned to the issue of substitutes, which Smith though had been agreed upon. Langston explained to Smith that the issue of notification to the Union concerning the use of substitutes was still open. Smith then asked Langston why the Union had sent the leaflet. Langston replied that the Union wanted to notify parents, so that in the event of a strike, they would not be surprised and could make arrangements for their children. Smith responded that "all this notice is going to do is enrage people. And, one of those people it's going to enrage is Paul Puzzo.[6] If there was any money available, there's no way we're going to get any now, because Paul is going to dig in his heels and, he's not going to give up anything." Langston retorted, "Joyce, well you told us, there wasn't any money. How would Paul be digging in his heels change the status of CRT's money issue?" Smith answered, "I don't know", changed the subject and the conversation ended.[7]

Prior to the meeting on October 14, Langston and Calvo discussed the fact that the Union had heard from Respondent claims that it "did not have any money," so they decided to obtain the "magic words" from Respondent in their next meeting and ask it to supply financial records. They prepared a letter in anticipation of what they believed Respondent would say at the meeting. The parties met on October 14. Langston began the meeting by asking Smith if there was any change in Respondent's final offer. Smith replied "No, there is no change. Everything is the same." Calvo pressed Smith by asking "are you telling us that's all there is? Are you telling us that you do not have the ability to pay for increase or for benefits?" Smith responded "No, there is no ability to pay any money." At that point Calvo handed Smith the letter that the Union had prepared. The letter reads as follows:

> Joyce Smith
> CRT
> 555 Windsor St.
> Hartford, CT 06120
>
> Dear Joyce:
>
> Based on CRT's contention that the organization does not have the ability to increase wages and other benefits for its bargaining unit employees, the Union is hereby requesting that CRT turn over all financial records to the Union so that we may forward the information to the International Union for their review.
>
> Please forward this information as soon as possible. After receiving this information, should we need further material or clarification of said information we will contact you.

[6] Puzzo is Respondent's President and CEO.

[7] My findings with respect to the conversation between Smith and Langston is based on the credible testimony of Langston, Smith was vague and equivocal concerning her testimony about the discussion, asserting merely that it was "no big deal." I do not credit her denial that Puzzo's name was mentioned during the conversation.

Very truly yours,

Michael Langston
Business Agent
Local 376 UAW

After receiving and reading the letter, Smith asked if the Union is asking to see all of the CRT's records, or just the records for the ECE program. Smith explained that she had previously offered to open the books of ECE to the Union. Langston replied that he would check and get back to Smith.

The next day Langston spoke to Smith on the phone, after speaking with Union President See. He informed Smith that the Union was looking for all of the CRT's records, and not just ECE's records. Smith asked why the Union needed to see CRT's financial records. Langston replied that Respondent had offered the 1.6% increase to all School Readiness employees, knowing that the 1.6% COLA is only paid by HHS to Head Start employees. Langston added that the Union wanted to know where the money was coming from to pay the 1.6.% to School Readiness employees. Langston also stated that Smith had informed the Union at prior sessions that Respondent could not take funds from another portion of the Agency and move it into ECE. Langston continued that for these reasons, the Union was looking to see all of CRT's financial records. When Langston asked Smith where the 1.6% to pay School Readiness employees was coming from, Smith replied that she wasn't sure.[8] On October 19, the Union received a letter from Palermino, dated October 18 . The letter reads as follows:

October 18, 2004

Mr. Michael Langston
Mr. Joseph Calvo
Business Agent
Local 376 UAW
30 Elmwood Court
Newington, CT 0611

Re: Your letter dated October 14, 2004

Dear Mr. Calvo and Mr. Langston:

During negotiations with your union, CRT has not contended inability to pay increase wages and/or other benefits. Therefore, there is no responsibility to provide all financial records to the union.

If there are any questions, please do not hesitate to contact me.

[8] The above findings with respect to the meeting of October 14 and the subsequent conversation between Smith and Langston is based on a synthesis of the credible portions of the testimony of Smith, Calvo and Langston. For the most part I have credited the more detailed and essentially mutually corroborative versions of Calvo and Langston, as opposed to Smith's vague uncertain, and incomplete testimony about these events.

Sincerely,
Anthony J. Palermino

CC: Joyce Smith, CRT

The Union responded by letter dated October 18 from Calvo to Palermino. It reads:

October 18, 2004

Attorney Anthony Palermino
945 Wethersfield Avenue
Hartford, Connecticut 06114-8137

Subject: Information Request

Dear Attorney Palermino:

In response to your letter of October 18, 2004, the Union is hereby advising you of our intent to file charges at the NLRB. The basis for our charges is that the Company through its representative Joyce Smith, has repeatedly stated across the bargaining table, that CRT has no money and has no ability to offer any raises. It was as a result of these repeated statements that we sent the October 14, 2004 letter to Ms. Smith. You letter of denial of such statements being made by the company confirms the necessity to file said charges.

Sincerely,
Joseph Calvo
International Representative

JC/ddp
Opeiu494afl-cio

CC: Joyce Smith
Russ See, President – Local 376 UAW
Mike Langston, Recording Secretary – Local 376 UAW

Respondent made no response to this letter from the Union. The instant charges were filed on October 18, 2004.

III. Analysis

In *NLRB v. Truitt Mfg.,* 351 U.S. 149, 152 (1956), the Supreme Court stated:

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some proof of its accuracy. And it certainly would not be farfetched for a trier of fact

> to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.

Since that time, the Board has consistently required employer's to comply with a union's request for financial information to verify an employer's claim of inability to pay the union's bargaining demands. However, the Board has wrestled with the distinction between "unwillingness to pay" and "inability to pay," and has frequently been reversed by the Courts with respect to this issue. *Neilson Lithographing Co.,* 305 NLRB 697 (1991); *Buruss Transfer,* 307 NLRB 226, 227-228 (1992); *Shell Co.,* 313 NLRB 133, 134 (1993); *Conagra Inc.,* 321 NLRB 944, 945 (1996), *enfd.* denied 117 F. 3d 1435, 1438 -1444 (D.C. Cir. (1997); *Stroehmann Bakeries,* 318 NLRB 1069, 1079 -1080 (1995); *enfd.* denied in pert. part 95 F. 3d 218, 222-223 (2nd Cir. 1996); *Lakeland Bus Co.,* 335 NLRB 322, 326 (2001), *enfd.* denied 347 F. 3d 955 (D.C. Cir. 2003); *NLRB v. Harvstone Mfg. Co.,* 785 F. 2d 570, 576-577 (7th Cir 1986); *Genstar Stove Products,* 317 NLRB 1203, 1298-1299 (1995); *Beverly Enterprises,* 310 NLRB 222, 226-227 (1993).

Perhaps in recognition of the fact that the Court's have on several occasions as detailed above, reversed the Board's conclusions on the issue of "unwillingness" versus "inability" to pay, or perhaps simply based on the views of different Board members, the test for analyzing this issue, has recently been somewhat altered, as explained in *AMF Trucking & Warehousing,* 342 NLRB No. 116 (2004) quoted approvingly in *Richmond Times Dispatch,* 345 NLRB No. 11 slip op. p. 3 (Aug. 26, 2005).

> [T]he phrase "inability to pay" means, by definition, that the employer is incapable of meeting the union's demands. That is, the phrase means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business.

Furthermore, the Board has held that even where an employer has made an assertion of inability to pay, where the employer effectively retracts such a claim, while rejecting the union's request for financial records, it need not provide such information, and such an employer does not violate the Act by failing to turn over such financial information. *Richmond Times Dispatch, supra,* slip op. p. 4-5; *American Polystyrene Co.,* 341 NLRB No. 67 slip op. p. 1-2 (2004); *Central Management Co.,* 314 NLRB 763, 768-769 (1994).

In applying the above precedent to the instant facts, the first issue presented is whether the Respondent, CRT has asserted an inability to pay. I conclude that based on the entire course of bargaining between the parties, that Respondent as a whole has not claimed that it has insufficient assets to pay or that there was any link between any inability to pay and nonsurvival in business. In fact the record discloses that Respondent made no specific assertions concerning CRT's financial condition or CRT's alleged inability to pay. I have concluded above, and I reiterate my conclusion here, that the statements made by Smith at the September meetings, that the "Agency" is in deficit, doesn't have money to pay beyond the COLA, "You can't get blood out of a stone", were in reference to ECE's financial condition, rather than CRT's financial status. Similarly, on October 14, when Calvo asked Smith if she was telling the Union that's all there is, and "You do not have the ability to pay", and Smith replied "There is no ability to pay any money", that Smith was referring to ECE, and that the

Union so understood. Smith's statements must be evaluated in light of the prior positions during bargaining, and Respondent's consistent position that it wanted ECE to be able to pay any increases out of its budget, and that Respondent did not intend to use other CRT funds to pay for ECE increases in wages or benefits. Indeed the Respondent had previously asserted that funding problems with ECE's funding sources, necessitated layoffs of employees, and it in fact furnished information to the Union, as requested substantiating these contentions. I find that it was therefore clear to the Union, that any claim of financial distress made by Respondent related solely to ECE, and not to CRT as a whole. Thus while Smith's statements could arguably be construed as an assertion that ECE has insufficient assets to pay more than 1.6% during the life of the contract being negotiated, *AMF Trucking,* it says nothing about CRT's ability to pay or any assets CRT may have to pay additional increases. It is clear from several statements made during bargaining by Smith and Palermino, that Respondent CRT was unwilling to pay any more money, or to transfer funds from other sources to fund raises for ECE employees.

However, that is not the end of the inquiry. General Counsel cites *Wells Fargo Armored Services,* 322 NLRB 616, 617, 628-629 (1996), for the proposition that a Union is entitled to inspect "company wide" financial information, even though the Employer was only asserting an inability to pay, because of financial distress at two branches. The ALJ, affirmed by the Board, concluded that "company wide" information was necessary so the Union could "intelligently evaluate the sought after information," i.e., financial information concerning the branches. Here General Counsel argues that the Union needs to inspect information concerning Respondent CRT's entire operation in order to intelligently evaluate Respondent's assertion that the ECE portion of the operation, is unable to pay more than the increases that it offered. In that regard, General Counsel contends that Respondent's witness asserted that at least some of the programs that CRT operates, preclude Respondent from using the funds for other programs. This was at least one of the reasons that Smith mentioned as to why it did not have sufficient funds under ECE's auspices to grant higher increases. Therefore, General Counsel asserts that the Union is entitled to test this claim by inspecting CRT's records. Further, it is argued that the Union wants to know how Respondent was able to fund the 1.6% increase for all unit employees that it offered, since only the Head Start employees are provided funding for these increases.

While these contentions may have some merit, and assuming that *Wells Fargo* is still good law,[9] I find that under the recent analysis of the Board in *AMF* and *Richmond Times Dispatch,* General Counsel has failed to meet its burden of establishing that Respondent has asserted an inability to pay claim, even with respect to ECE. Thus *AMF* and especially *Richmond Times Dispatch,* appear to have added a new requirement to proving that an Employer has asserted an "inability to pay". That is the assertion made in *AMF* and relied upon in *Richmond Times Dispatch,* that "inability to pay" is "inextricably linked to nonsurvival in business." While numerous prior Board and Court cases would discuss and consider statements made by employers concerning the possible "survival of the business", in assessing

[9] I have serious doubts about the precedential value of *Wells Fargo.* Although it has not been overruled, it also has not been cited for the proposition that a Union is entitled to inspect financial records of a parent company, when it is merely pleading inability to pay at a particular facility. In view of the Board's recent trend to restrict *Truitt* as set forth above and below, I have some doubts about how *Wells Fargo* would be decided today. Further the evidence relied upon in *Wells Fargo* to establish inability to pay of the branches, would not in my view meet the more stringent test set forth in *AMF* and *Richmond Times Dispatch.*

whether an inability to pay claim was asserted,[10] it had not required the General Counsel to prove that the Employer had asserted that it would go out of business if it were to meet the Unions demands. *AMF* slip op. p. 2, *Richmond Times Dispatch,* slip op. at p. 3-4. While I happen to agree with the dissents in these cases, that "inability to pay" is not "inextricably linked to nonsurvival in business," and inability to pay can be established where the employers "words reasonably interpreted, claim that it is financially unable to pay," *Atlanta Hilton & Tower,* 271 NLRB 1600, 1602 (1989), without claiming that the employer's survival is at stake, I am of course bound by the majority decisions therein.

Here, while Smith's comments such as the Agency (ECE) "doesn't have money to pay beyond the COLA", plus "you can't get blood from a stone,"[11] and "there is no ability to pay any money," are sufficient in my view to establish that Respondent was asserting that ECE had insufficient assets to pay more than the COLA, during the term of the contract,[12] these statement do not assert that CRT or ECE for that matter, could not or even might not survive, if it had to pay additional increases, Therefore, I find that under *AMF* and *Richmond Times Dispatch,* the General Counsel has not established that Respondent has asserted an inability to pay for either CRT or ECE, and that Respondent has not violated the Act by failing to provide the information requested.

I note particularly in *Richmond Times Dispatch,* that the Employer in writing had stated that it was "unable to pay" the bonus that it cancelled, and that it "had no choice based on the business environment". Notwithstanding these comments, which were made in writing, unlike Smith's remarks, which were made in part in response to questions by the Union in an attempt to "set up" a violation, the Board concluded that no inability to pay claim was asserted, principally because the Employer had not asserted that its "demise was imminent," (slip op. p. 4) if it was forced to pay the bonus, or that the bonus was cancelled "as a measure upon which Respondent's survival was based." slip op. p.3.

Here Smith's statements were less probative of an inability to pay claim that the comments in *Richmond Times Dispatch,* and as in *Richmond Times Dispatch* and *AMF,* there is not even a suggestion that CRT or ECE's survival is at stake, if additional increases were provided.

Accordingly, based on this recent precedent alone, I conclude that Respondent has not pleaded inability to pay, and has not violated the Act.

Furthermore, even if I were to conclude contrary to the above precedent, that Respondent did make inability to pay claims in the September and October meetings, I find that Respondent has retracted any such assertions made by Smith, by Palermino's response to the Union's requests for information, in his letter of October 18. Such a retraction was prompt and unequivocal, and leads to a finding that Respondent has not violated the Act. *Richmond Times Dispatch, supra,* slip op. p. 4-5; *American Polystyrene, supra; Central Management, supra.*

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[10] Compare *Buruss, supra; Neilsen, supra;* with *Shell Oil, supra;* and *Conagra, supra.*

[11] See, *Continental Winding Co.,* 305 NLRB 122, 123, 141 (1991) (ALJ, affirmed by the Board, relies upon statement that there was no money, and the Union "could not squeeze blood from a turnip" to find an inability to pay expressed by Employer). But, *CF Genstar Stove, supra* at I298-1299 (1995) (Statement that "well was dry", insufficient to establish inability to pay.)

[12] Indeed Respondent asked for a one year contract, because it hoped that the Connecticut Legislature would increase funding, so that additional increases could be paid in later years.

I note that the retraction here is even more effective than the retractions found valid in the above cases, since it was consistent with Palermino's response to the Union's question in the meeting of March 8 that Respondent was not claiming "inability to pay." General Counsel argues that this comment by Palermino should be disregarded because wages were not even on the table at that time. I disagree. While wages had not been discussed, the Union had already submitted a demand for a "substantial" wage increase, by the March meeting, so wages were clearly on "the table" at the time. More importantly, the issue under discussion at the time that the Union asked the question, and Respondent made its response, was medical coverage, and Respondent's decision to make changes in employee coverage, due to increases from the carrier. That is clearly an economic issue, just as much as wages, and I find therefore that Respondent's statement in March, is consistent with and relevant to Palermino's October letter in response to the Union's request.

Accordingly, I find Palermino's retraction in his October letter to be a clarification of Smith's remarks, and consistent with Respondent's prior position, that it was not a claiming inability to pay. Therefore even assuming that Smith's remarks amounted to an "inability to pay" claim, it was retracted by Palermino's letter, and Respondent did not violate the Act, by failing to turnover the information requested. *Richmond Times Dispatch, supra; American Polystyrene, supra.*[13] Based on the foregoing I recommend that the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Steven Fish
Administrative Law Judge

[13] While in *Lakeland Bus, supra,* the Board found an attempted retraction insufficient, I find the fact here closer to *Richmond Times Dispatch* and *American Polystyrene* then *Lakeland Bus.* I note that here, unlike in *Lakeland,* the alleged claim of inability to pay was made orally, and the retraction was made promptly. I also note that *Lakeland* was reversed by the Court of Appeals. Moreover, Board majorities in *American Polystyrene* and *Richmond Times Dispatch* noted that reversal, but declined to pass on the validity of *Lakeland*. Further, as noted by Member Liebman in her dissent in *Richmond Times Dispatch,* the majority believes that *Lakeland* was wrongly decided.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.